Court, U.S.
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No. 03-

IN THE

Supreme Court of the United States

OTIS ELEVATOR COMPANY,

Petitioner,

v.

YASHARAY MACK AND LOCAL ONE, INTERNATIONAL UNION OF ELEVATOR CONSTRUCTORS,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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90 pp

QUESTION PRESENTED

Did the United States Court of Appeals for the Second Circuit err when it held, in disagreement with the Seventh Circuit, that an hourly worker with no authority to take any tangible employment action against another hourly worker and fellow union member, whom he allegedly harassed, was nevertheless a "supervisor" for the purpose of imposing vicarious liability on his employer because he made and oversaw daily work assignments pursuant to a collective bargaining agreement?

PARTIES TO THE PROCEEDING AND CORPORATE DISCLOSURE STATEMENT

Petitioner

Petitioner is Otis Elevator Company, a wholly-owned subsidiary of United Technologies Corporation, a publicly traded company.

Respondents

Respondents are Yasharay Mack, an individual, and Local One, International Union of Elevator Constructors, a labor union. Petitioner believes that Local One has no interest in the outcome of this petition.

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The opinion of the United States Court of Appeals for the Second Circuit is reported at 326 F.3d 116 (2d Cir. 2003). A copy of the opinion is included in Appendix A at 1a-24a. The Memorandum and Order of the District Court granting Petitioner's motion for summary judgment was published at 91 Fair Empl. Prac. Cas. (BNA) 996 and 169 L.R.R.M. (BNA) 2620 (S.D.N.Y. Dec. 18, 2001). It is reprinted in Appendix B at 25a-59a.

STATEMENT OF JURISDICTION

The United States Court of Appeals for the Second Circuit denied a petition for rehearing on May 14, 2003. (Appendix C at 60a-61a.) Petitioner invokes this Court's jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTES INVOLVED

Section 703 of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2, provides, in pertinent part:

> (a) Employer practices. It shall be an unlawful employment practice for an employer –
>
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's . . . sex . . . .

Section 701 of the Civil Rights Act of 1964, 42 U.S.C. § 2000e(b), reads in pertinent part as follows:

> (b) The term "employer" means a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year, and any agent of such a person . . .."

PRELIMINARY STATEMENT

The companion cases of *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998), and *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998), held that an employer is vicariously liable for sexual harassment by a supervisor that does not involve a tangible employment action unless the employer can establish an affirmative defense. The employer does not face vicarious liability, however, if the harasser is a co-employee of the victim, not a supervisor. Rather, employers are liable for co-employee harassment only if the employers themselves have contributed to that harassment through their own negligence.

Although *Ellerth* and *Faragher* held that the burden of proof and basis for a claim depend on the determination whether a harasser is a supervisor or a co-employee, those opinions did not explain how to make that determination. Following the reasoning in *Ellerth* and *Faragher* and pre-1998 case law, most of the district courts, and all of the courts of appeal to have addressed the issue, have held that a supervisor is someone to whom the employer has delegated the authority to affect the economic terms and conditions of the victim's employment.

In this case, the Second Circuit explicitly rejected that consensus, adopting instead the far more nebulous standard urged by the Equal Employment Opportunity Commission ("EEOC"). In so doing, it held that Otis is vicariously responsible for the alleged actions of one of its hourly employees, a union member who uncontestedly had no authority, direct or indirect, to hire, fire, demote, promote, transfer, or discipline his co-employee and co-union member.

This court should grant certiorari to restore uniformity among the Circuits and to correct the Second Circuit's expansion of an employer's vicarious liability far beyond what Congress intended.

STATEMENT OF THE CASE

Petitioner Otis Elevator Company ("Otis") manufactures, sells, installs, and maintains elevators. In the New York City area, where this case arose, the Otis employees who install and maintain elevators all belong to Local One, International Union of Elevator Constructors, which has a collective bargaining agreement ("CBA") with Otis. Both the plaintiff-respondent, Yasharay Mack ("Mack") and her alleged harasser, James Connolly ("Connolly"), were hourly employees represented by Local One.

The CBA covers two categories of employees, mechanics (journeymen) and helpers (apprentices). Helpers, who are paid less than mechanics, work with and under the direction of a mechanic. Mack was a helper; Connolly was a mechanic.

The CBA requires that when five or more employees are employed on a service job, one of the mechanics is to be designated mechanic in charge and paid 12½% more for each

hour actually worked as mechanic in charge. Under the CBA, the mechanic in charge "shall have the right to assign and schedule work, direct the workforce, assure the quality and efficiency of the assignment, and to enforce the safety practices and procedures on the job to which he is assigned by the Company." (J.A. at 417.)[1] The mechanic in charge does not, however, have any role in the evaluation or discipline of any other employee, nor does the mechanic in charge have a role in the grievance process in the event that disputes arise on the job.[2] Similarly, the mechanic in charge plays no role in the assignment of mechanics or helpers to various shifts and no role in determining how much overtime may be used. Rather, his job is to allot the work required by management among the employee resources made available by management.[3]

---

1. Citations in the form "J.A. at __" refer to the Joint Appendix filed in the Court of Appeals.

2. The CBA specifies that an employee with a complaint "shall first discuss the issue with his/her supervisor and/or business agent. . . ." (J.A. at 418.) Throughout the CBA, the terms "supervisor" and "supervision" refer to management. (*E.g.*, J.A. at 417 ("service ~~Helpers~~ Apprentices shall be assigned daily by supervision or by a ~~Mechanic~~ Journeyman to one or more locations").)

3. Connolly explained his role as follows:

> I would basically say to the mechanic depending on what time in the job it was, what had to be done, because at various times there was different number of mechanics, so everybody would do their own assignment. If there was five elevators shut down, it would be you take that and you take this and you would take that and you would take that.

(Cont'd)

Local One's constitution treats the position of mechanic in charge as one of special responsibility to the union. The union constitution requires that the mechanic in charge:

> report immediately to the union the following:
>
> (1) Any Brother shifted from said job or shifted to said job.
>
> (2) Any Brother injured on said job.
>
> (3) Any Brother who performs his work hazardous to other Brothers on said job.
>
> (4) Any work assigned or performed by another trade that belongs to the jurisdiction of Local No. One.

(J.A. at 363.)

Mack applied through Local One for work as a helper in May or June of 1999. Otis hired her in that capacity in July. Before she began work, she met with Paul Barrett, Director of Human Resources for Otis in New York City.

(Cont'd)
(J.A. at 545.) If someone refused an assignment from Connolly, he would "talk to the shop steward or someone in-house to address the problem." (*Id.* at 546.)

The mechanic in charge coordinates the assignment of overtime work with the shop steward, a union official, in order to assure equitable distribution of overtime. (*Id.* at 547, 568.)

It is undisputed that he told her to contact him if she experienced any difficulties at the work site, and that she knew how to do so. (J.A. at 60 ¶10, 440 ¶10.)

After two brief assignments elsewhere, Mack was assigned to work as a helper in the Maintenance Department at 200 Park Avenue ("200 Park"). That building housed 69 elevators and 18 escalators, and Otis performed both maintenance and modernization work in the building. Although most of the Otis employees at 200 Park worked on the modernization project, there were enough employees assigned to maintenance to trigger the CBA's requirement that there be a mechanic in charge. Connolly had that role.

Otis managers Michael Donohue, Gerald Mazur, and Philip Gallina worked as supervisors at 200 Park during Mack's tenure there. Gallina supervised the maintenance department and had an office on the 44th floor of the building. Mack knew where Gallina's office was.[4]

When Mack began work at 200 Park, she was assigned to the 8:00 a.m. to 4:00 p.m. shift, the same shift Connolly worked. During her three weeks on that shift, she occasionally worked directly with Connolly, and she contends that he immediately began harassing her with unwanted attentions and crude and insulting remarks. After three weeks on the day shift, Mack was reassigned by Otis to the 4:00 p.m. to

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4. Mack admitted Otis's statement of undisputed fact that "Mr. Gallina's office was located at 200 South Park, and he was available to Plaintiff if she had questions." She disputed whether Gallina was at the building "on a daily basis" and she added that when Gallina was there, "he was rarely at the location where work on elevators was being done." (J.A. at 60-61 ¶12, 441 ¶12.)

12:00 a.m. shift.[5] On that shift, she generally did not work with Connolly. Mack received specific direction as to what tasks to perform from the mechanic with whom she was working at any given time.

Although Mack and Connolly worked different shifts after the first three weeks, they overlapped in the building at the end of the first shift and when Connolly worked overtime.[6] Mack claims that Connolly continued his verbal and occasionally physical harassment. In November, she alleges that she complained to Gallina that she "was plagued with a lot of sexist issues with [Connolly]" and that Connolly was "very abusive" and "always making rude and sexist comments to [her]." Mack admits that she made no complaints to any Otis manager other than her alleged conversation with Gallina, and she acknowledges that she did not go into much detail with Gallina.[7] (J.A. at 63-64 ¶19, 442 ¶19.) As she explained, she did not want to get the reputation of being a "rat" by complaining to management about a fellow member of the union.[8]

---

5. Connolly played no role in the assignment of mechanics or helpers to different shifts.

6. Mack testified that when Connolly worked overtime, he was just another mechanic, not the mechanic in charge. (J.A. at 184.) Her understanding is consistent with the terms of the CBA. (J.A. at 417.)

7. Gallina denies that she ever complained to him about Connolly.

8. I work with the mechanics, they are Union guys, they are company haters and I want to really go in this field

(Cont'd)

In May of 2000, M[illegible]k's father made a telephone call to Local One and a telephone call to Otis to complain about Connolly's treatment of his daughter. Mr. Mack's call to Otis was taken by a manager in Otis's mid-town office, who immediately contacted Barrett. Within two days, Barrett and an officer of Local One met with Mack and her father. Otis initiated an investigation and offered to transfer Mack to another work location. Mack, however, never returned to work after that meeting.

Mack sued Otis[9] under Title VII and similar state and local enactments.[10] On Otis's motion for summary judgment,

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(Cont'd)

> and if you go and you rat on another brother or sister, that's it. You will not get your overtime, you will not be respected.

(J.A. at 117.)

> Being a rat is going to the company, that's what being a rat is.
>
> Q. You certainly didn't want to be a rat?
>
> A. No.

(*Id.* at 171.)

9. Mack also sued Local One, claiming a breach of the duty of fair representation. The District Court granted summary judgment in Local One's favor and the Court of Appeals affirmed that judgment.

10. The standard for determining liability under the state and local laws is identical to the standard under Title VII. (App. A at 8a; App. B at 37a.)

the District Court followed the *Ellerth-Faragher* analysis. First, it held that since the law of the Second Circuit does not consider an alleged constructive discharge to be an allegation of a tangible employment action, Mack's claims against Otis did not trigger the automatic vicarious liability that results when a tangible employment action has been taken as part of the alleged harassment.[11]

Next, the District Court considered whether Otis would be subject to vicarious liability for Connolly's alleged actions, subject to its right to establish an affirmative defense. That question turned on whether Connolly qualified as a "supervisor" of Mack. To answer that question, the District Court adopted the reasoning of the United States Court of Appeals for the Seventh Circuit in *Parkins v. Civil Constructors, Inc.*, 163 F.3d 1027 (7th Cir. 1998):

> [I]t is manifest that the essence of supervisory status is the authority to affect the terms and conditions of the victim's employment. This authority primarily consists of the power to hire, fire, demote, promote, transfer, or discipline an employee. Absent an entrustment of at least some of this authority, an employee does not qualify as a supervisor for purposes [of] imputing liability to the employer.

(App. B at 39a) (quoting *Parkins*, 163 F.3d at 1034).) The District Court also relied on the Fourth Circuit's holding that an employee's "occasional authority to direct [the operational conduct of another employee] while on duty" does not constitute supervisory authority. (*See* App. B at 40a

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11. (App. B at 38a n.3.)

(quoting *Mikels v. City of Durham*, 183 F.3d 323, 334 (4th Cir. 1999).) Since Mack had not presented any evidence to support her claim that Connolly had the ability to take or influence a tangible employment action with respect to her status, the District Court held that Connolly was not a supervisor within the *Ellerth-Faragher* framework.

Finally, the District Court concluded that the admittedly vague conversation Mack claimed to have had with Gallina in November did not constitute notice to Otis of Connolly's alleged harassment. Since there was no evidence of any other purported notice to Otis before the calls made by Mack's father in May and since Otis responded promptly and appropriately to those calls, the District Court held that Mack could not establish liability based on negligence by Otis. (App. B at 47a-50a.) Accordingly, the District Court granted Otis's motion for summary judgment.

The Court of Appeals reversed, holding that Connolly is a supervisor as a matter of law and that Mack had presented sufficient evidence, in the form of her alleged conversation with Gallina, to raise a triable response to Otis's affirmative defense. In reaching its conclusion, the court acknowledged that Connolly possessed none of the authority the Seventh Circuit considered essential to a finding that an alleged harasser is a supervisor. (App. A at 15a-16a.) The Second Circuit, however, disagreed with the Seventh Circuit's definition:

> We therefore conclude that the authority that renders a person a supervisor for purposes of Title VII analysis is broader than that reflected in the *Parkins* test.

> To be sure other courts have adopted the *Parkins* definition of supervisor.[12] For the reasons set forth above, however, we agree with those courts that have not defined supervisor so narrowly.[13]

(*Id.* at 17a.)

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12. At this point, the Court of Appeals referred to footnote 5 of its opinion, which reads as follows:

> The district court also cited *Trigg v. New York City Transit Auth.*, No. 99-CV-4730, 2001 WL 868336, at *7, 2001 U.S. Dist. LEXIS 10825, at *22 (E.D.N.Y. July 26, 2001) (adopting the *Parkins* definition of supervisor as one who has "the power to hire, fire, demote, promote, transfer, or discipline an employee"), *aff'd*, No. 01-9104, 2002 WL 1900463, 2002 U.S. App. LEXIS 17355 (2d Cir. Aug. 16, 2002); *Jackson v. T & N Van Serv.*, 86 F. Supp. 2d 497, 501 (E.D. Pa. 2000) (citing with approval the *Parkins* definition of supervisor); and *Mikels v. City of Durham*, 183 F.3d 323, 334 (4th Cir. 1999) (considering, in concluding that the allegedly harassing employee was not the plaintiff's supervisor, that the employee did not have the power to take tangible employment actions against the plaintiff), in support of the test it employed to determine whether Connolly was Mack's supervisor. *Mack*, 2001 WL 1636886, at *7, 2001 U.S. Dist. LEXIS 20917, at *21-*22.

(App. A at 16a n.5.)

13. The opinions cited by the Court of Appeals allowing this statement are *Dinkins v. Charoen Pokphand USA, Inc.*, 133 F. Supp. 2d 1254, 1266 (M.D. Ala. 2001) and *Kent v. Henderson*, 77 F. Supp. 2d 628, 634 (E.D. Pa. 1999). (*See* App. A at 17a.)

REASONS FOR GRANTING THE PETITION

I. The Decision Below Creates A Conflict Among The Circuits On An Important And Recurring Question Of Federal Law

Under *Ellerth* and *Faragher*, the decision whether a harasser is or is not a supervisor carries significant legal consequences. If the harasser is a supervisor, the employer is vicariously liable for his or her actions, although the employer can avoid liability for the supervisor's actions in the absence of a tangible employment action[14] by proving the elements of the affirmative defense recognized in *Ellerth* and *Faragher*. *Ellerth*, 524 U.S. at 764-65; *Faragher*, 524 U.S. at 807-08. If, on the other hand, the harasser is not a supervisor, the employee bears the burden of proving that the employer has been negligent. *Faragher*, 524 U.S. at 799-800; *see, e.g.*, *Quinn v. Green Tree Credit Corp.*, 159 F.3d 759, 766 (2d Cir. 1998). As the holdings below demonstrate, the difference in burdens will often be decisive.

Although *Ellerth* and *Faragher* "have been a source of confusion for lower courts attempting to determine exactly which employees qualify as supervisors," Stephanie Ann Henning Blackman, Note, *The Faragher and Ellerth Problem: Lower Courts' Confusion Regarding the Definition of "Supervisor"*, 54 Vand. L. Rev. 123, 124 (2001), that confusion has not previously extended into the ranks of the Courts of Appeals. *See* Timothy S. Bland & David P. Knox,

14. "A tangible employment action constitutes a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits." *Burlington Indus., Inc. v. Ellerth*, 524 U.S.742, 761 (1998).

EEOC's Guidance On Vicarious Liability For Supervisory Harassment: Are the Courts Following the EEOC's Lead?, 30 U. Mem. L. Rev. 793, 803 (2000) (noting that *Ellerth* and *Faragher* "contained virtually no information regarding how to determine whether an employee is a supervisor" and that courts have been "reluctant" to adopt the broad definition advocated by the EEOC.) The conflict created by the decision below is clear: if the Second Circuit had applied the standard established by the Seventh Circuit in *Parkins* (and the Fourth Circuit in *Mikels v. City of Durham*, 183 F.3d 323 (4th Cir. 1999)),[15] it would have affirmed the District Court's holding that Connolly was not Mack's supervisor. Instead, the Second Circuit disagreed with *Parkins*, siding with "those courts that have not defined supervisor so narrowly."[16] (App. A at 17a.) The Second Circuit thus became the only court of appeals to reject "the traditional 'hiring, firing, or conditions of employment' definition of supervisor." Blackman, Note, 54 Vand. L. Rev. at 146; *see Indest v. Freeman Decorating, Inc.*, 168 F.3d 795, 804 (5th Cir. 1999) (Wiener, J., concurring) "'Supervisor' continues to mean the same thing that it meant under pre-*Ellerth/Faragher* jurisprudence."); *Pierce v. Commonwealth Life Ins. Co.*, 40 F.3d 796, 803 (6th Cir. 1994)

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15. *See also Hall v. Bodine Elec. Co.*, 276 F.3d 345, 355 (7th Cir. 2002) ("[T]he fact that an employer authorizes one employee to oversee aspects of another employee's job performance does not establish a Title VII supervisory relationship. An individual is not a supervisor unless he possesses the authority to directly affect the terms and conditions of a victim's employment.").

16. In its invited amicus filing in the Second Circuit, the EEOC urged the court to read *Parkins* as consistent with a finding that Connolly was a supervisor. (Br. of the EEOC as Amicus Curiae at 16-17, *Mack v. Otis Elevator Co.*, 326 F.3d 116 (2d Cir. 2003).) The Second Circuit declined that invitation to judicial sophistry.

(Courts have defined "agent" in Title VII as "an individual who 'serves in a supervisory position and exercises significant control over the plaintiff's hiring, firing, or conditions of employment.'")

The Second Circuit's holding will only increase the confusion in the lower courts concerning the question made central by *Ellerth* and *Faragher*. In the year ending September 30, 2002, employment cases under the civil rights statutes constituted the largest category of new cases identified by the Administrative Office of the U.S. Courts, other than habeas corpus petitions and asbestos claims. Administrative Office of the United States Courts, *2002 Annual Report of the Director: Judicial Business of the United States Courts*, Table C-2A, *available at http://www.uscourts.gov/judbus2002/contents.html*.[17] Allowing the uncertainty and division among the lower courts to continue would, therefore, significantly impede the work of the judicial system while raising the cost of litigation for tens of thousands of employers and employees.

II. The Decision Below Incorrectly Extends An Employer's Vicarious Liability For Sexual Harassment By An Employee

Ellerth and *Faragher* accepted the holding in *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57 (1986), that Congress intended "to place some limits on the acts of

17. In three of the preceding four years, only habeas petitions outnumbered civil rights employment actions, and in the fourth, the year ending September 30, 1998, employment cases outnumbered any other category. Administrative Office of the United States Courts, *2002 Annual Report of the Director: Judicial Business of the United States Courts*, Table C-2A, *available at http://www.uscourts.gov/judbus2002/contents.html*.

employees for which employers under Title VII are to be held responsible." *Id.* at 72. *See Ellerth*, 524 U.S. at 763-64; *Faragher*, 524 U.S. at 792, 800. To recognize that limitation, reflected in Title VII's applicability only to an "employer" and its definition of "employer" as "a person engaged in an industry affecting commerce . . . and any agent of such a person," 42 U.S.C. § 2000e(b), this Court limited an employer's potential vicarious liability for its employees' actions to wrongdoing by a "supervisor". *Faragher*, 524 U.S. at 800-01. As the Court explained in *Ellerth*, a supervisor is a person who has been empowered by the employer to take or bring about tangible employment actions, and that empowerment may significantly increase the supervisor's power to harass:

> A co-worker can break a co-worker's arm as easily as a supervisor, and anyone who has regular contact with an employee can inflict psychological injuries by his or her offensive conduct. But one co-worker (absent some elaborate scheme) cannot dock another's pay, nor can one co-worker demote another. Tangible employment actions fall within the special province of the supervisor. **The supervisor has been empowered by the company as a distinct class of agent to make economic decisions affecting other employees under his or her control.**

Ellerth, 524 U.S. at 762 (citations omitted, emphasis added).[18]

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18. The harasser in *Ellerth* was a mid-level manager with hiring and firing authority (subject to higher-level approval) over Ellerth. *Ellerth*, 524 U.S. at 747. In *Faragher*, the harassers were officers (a lieutenant and a captain) in a work unit structured as a paramilitary

(Cont'd)

When no tangible employment action has occurred, the supervisor's augmented ability to harass created by the implicit threat of the company-conferred power "to make economic decisions affecting other employees under his or her control" justifies imposing vicarious liability on the supervisor's employer. *Id.* at 763-65.

The *Parkins* definition of a supervisor is consistent with the language and rationale of *Ellerth*; the holding below is not. The Second Circuit found that Connolly was Mack's supervisor, as a matter of law, because "he had and exercised the authority to make and oversee the daily work assignments of the mechanics and mechanics' helpers at 200 Park, including Mack." (App. A at 18a.)[19] That ruling adopts the position of the EEOC's enforcement guidelines, which state as follows:

> An individual qualifies as an employee's "supervisor" if:
>
> a. the individual has authority to undertake or recommend tangible employment decisions affecting the employee; *or*

(Cont'd)

organization, and Faragher was an employee at the lowest level of that structure. "Through this chain of command, the City vested in the Marine Safety supervisors [the harassers] both administrative and disciplinary authority over the lifeguards." *Faragher v. City of Boca Raton*, 864 F. Supp. 1552, 1564 (S. D. Fla. 1994), *aff'd in part, rev'd in part*, 111 F.3d 1530 (11th Cir. 1997) (en banc), *rev'd*, 524 U.S. 807 (1998).

19. While it is undisputed that Connolly, as mechanic in charge, allocated work among the mechanics, he assigned tasks to Mack only when she worked with him as his helper. Otherwise, she did what the mechanic with whom she was working told her to do. (*See* J.A. at 78, 81 (mechanic tells helper what to do).)

b. The individual has authority to direct the employee's daily work activities.

EEOC: Guidance on Vicarious Employer Liability for Unlawful Harassment by Supervisors, 8 Fair Empl. Prac. Manual (BNA) 405:7651, 7654 (2003). (*See* App. A at 17a-18a.)

This "standard" draws almost no line at all around an employer's vicarious liability for the actions of its employees. Mack was a mechanic's helper, an apprentice. Every journeyman mechanic with whom she worked had "authority to direct [her] daily activities." Indeed, the very definition of an "apprentice" contemplates exactly that relationship between apprentice and journeyman. *See* Webster's Third New Int'l Dictionary 106 (1986) (defining apprentice as "one who is learning by practical experience under skilled workers a trade, art, or calling") Under the Second Circuit's holding, each of Otis's mechanics can be a "supervisor" for the purpose of imposing vicarious liability under Title VII.[20]

Even in the absence of formal apprenticeship programs, the modern workplace is likely to contain a great variety of work arrangements in which one employee directs others in carrying out tasks in which he or she is particularly skilled.[21]

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20. In her deposition testimony and in her briefs to the Second Circuit, Mack identified each of the mechanics with whom she worked as her supervisors.

21. *See, e.g.*, Steven H. Appelbaum, Mary Bethune, and Rhonda Tannenbaum, *Downsizing and the emergence of self-managed teams*, Participation and Empowerment: An International Journal, Vol. 7 No. 5, at 109 (1999) (estimating that by 2000, (Cont'd)

Under the rule adopted by the Second Circuit, employers will be vicariously liable for acts of harassment committed by employees who step into these leadership, but not management, roles.[22] And, of course, the many employers organized along paramilitary lines, such as police and fire departments and private security services, will be vicariously liable for the actions of every employee other than the most raw recruit, since each employee can tell colleagues with lower ranks what to do.[23] *But see Mikels v. City of Durham*,

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(Cont'd)
"90 percent of all North American organizations will have at least some type of self-managed teams"); *id.* at 124 (self-managed teams "typically handle job assignments, plan and schedule work, make production-related decisions and take action on problems" as part of "a downward push of management's power to the employee ranks"); Kimball Fisher, *Leading Self-Directed Work Teams* 3 (1993) (widespread adoption of "various forms of empowerment" including "self-directed work teams"). *See generally* Andrew Polland, Comment: *The Emergence of Self-Directed Work Teams and Their Effect on Title VII Law*, 148 *U. Pa. L. Rev.* 931 (2000).

22. The EEOC guidelines endorsed by the Second Circuit even specify that "[a]n individual who is temporarily authorized to direct another employee's daily work activities qualifies as his or her 'supervisor' during that time period." EEOC: Guidance on Vicarious Employer Liability for Unlawful Harassment by Supervisors, 8 Fair Empl. Prac. Manual (BNA) 405:7651, 7655 (2003). Thus, by asking one employee to teach another how to perform a task and thereby empowering the teacher to "direct [the student's] daily activities" for the period of the instruction, the EEOC guidelines provide that the employer becomes vicariously liable for any Title VII violation he commits.

23. The Second Circuit's apparent belief that the senior employee "regularly" on a work site *ipso facto* becomes a "supervisor" (*see* App. A at 18a) necessarily implies that a corporal working with a private in a guard shack can impose vicarious liability on their mutual employer.

183 F.3d 323, 333-34 (4th Cir. 1999) (holding that corporal in police department not "supervisor" of patrol officer for purposes of Title VII).

Faragher explained that imposing vicarious liability on employers for harassment committed by supervisors makes sense because the number of supervisors is limited:

> Recognition of employer liability when discriminatory misuse of supervisory authority alters the terms and conditions of a victim's employment is underscored by the fact that the employer has a greater opportunity to guard against misconduct by supervisors than by common workers; employers have greater opportunity and incentive to screen them, train them, and monitor their performance.

Faragher, 524 U.S. at 803. The holding below and the EEOC Guidelines it adopts assign vicarious liability far more promiscuously. Under the Second Circuit's holding, an hourly employee with a special obligation to report contract-related issues to his union has become Otis's agent for the purpose of imposing vicarious liability on it. Under the Second Circuit's reasoning, all of Otis's service and maintenance employees other than apprentices, and a large percentage of all employees of most employers, will be sources of vicarious liability under Title VII, at least some of the time.[24] That result is not what Congress intended or this Court contemplated.

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24. *See supra* n.22.

CONCLUSION

For the reasons stated above, this Court should grant Otis's Petition for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Second Circuit.

Respectfully submitted,

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